Nos. 78-249 and 78-17

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

*v.*

BILLY J. MCCOMBS, ET AL.

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UNITED GAS PIPE LINE COMPANY, PETITIONER

*v.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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In this case the court of appeals held that the cessation of production of natural gas from a leasehold from 1966 to 1971 effected a lawful abandonment of certificated service under Section 7(b) of the Natural Gas Act (15 U.S.C. 717f(b)), even though no one during that time sought or obtained abandonment permission from the Commission and even though respondents are now producing and selling gas from the leasehold. In response to our contention that the court's decision is contrary to

Section 7(b), which requires the Commission's approval for abandonment, respondents have argued (1) that the court did not usurp the Commission's function under Section 7(b) but rather held that the Commission erred as a matter of law in failing to authorize abandonment retroactively (Resp. Br. 13-22), and (2) that in any event the gas reserves from which respondents are currently producing were never dedicated to interstate commerce because they are allegedly different from the reserves on the same leasehold from which gas was produced before 1966 (*id.* at 22-31). Both arguments are incorrect.

I

a. Respondents misstate the court of appeals' holding when they claim that the court reversed the Commission for refusing in this proceeding to grant retroactive abandonment. The court did not hold that the Commission had erred in declining to grant an abandonment application, retroactive or otherwise. It held that the facts of this case—cessation of production from 1966 to 1971—rendered any Commission determination of the abandonment question pursuant to Section 7(b) unnecessary.[1]

b. Moreover, if the court had done what respondents claim it did, and considered and reversed the Commission's refusal in this proceeding to grant abandonment retroactively, its decision would have been erroneous under Section 7(b). That Section provides that no natural gas company shall abandon certificated facilities or service "without the permission and approval

[1]The court stated, for example, that "there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission;" that "there was no need for the formality of a Section 7(b) hearing;" and that "strict compliance with the non-abandonment language of [Section 7 (b)] does not control under the facts and circumstances here" (A. 31A-33A). See our main brief at pages 34-37.



of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted * * * or that the present or future public convenience or necessity permit such abandonment." By requiring a "due hearing" and "a finding by the Commission," Section 7(b) seeks to ensure that all interested parties will have an opportunity to examine the facts respecting an abandonment application at the time those facts are alleged to exist, and that the Commission, as the expert agency entrusted with the task, will have an opportunity to make a determination based on those facts at that time. In addition, by prohibiting abandonment until the Commission has formally approved it, the Section provides certainty and reliability by giving interested parties a clear and definitive public statement of whether once-dedicated acreage remains dedicated to interstate commerce. As this Court said in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 158 n.25 (1960):

> [I]f [natural gas] companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under §7(b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.

The Commission's denial in this proceeding of respondents' request for abandonment authority retroactive to the period 1966 to 1971 was firmly grounded in the purposes of Section 7(b), and if the court of appeals had considered and reversed that action (as respondents claim it did), its decision would have been error. Respondents claim that the Commission erred as a matter of law in refusing to grant retroactive abandonment because (1) the

Commission assertedly would have granted an abandonment application if one had been filed in 1966-1971, and (2) the failure of respondents' assignor, Haring, to apply for abandonment at that time was allegedly in "good faith" (Resp. Br. 18-21).

For the court to have held that the Commission had to grant retroactive abandonment because it would have granted abandonment if an application had been timely filed would defeat Section 7(b)'s purpose of providing interested parties such as United with an opportunity to examine and possibly rebut, at the relevant time, the facts alleged in support of the abandonment application. It is no answer for respondents to claim (Br. 22) that all interested parties had a surrogate opportunity in these proceedings a number of years later. No one knows what evidence the parties or the Commission might have produced if an application had been filed, and a hearing held, at the relevant time.[2] And in contending that the

[2]Respondents repeatedly assert that on the facts known in 1966, "there is no doubt that the Commission would have granted * * * abandonment permission and probably would have done so in a routine fashion * * *" (Resp. Br. 20; see also Br. 9, 17.) There is no basis for this speculation, since no application for abandonment was filed and thus no one had any reason or occasion to investigate the assertion of respondents' predecessor, Haring, that the reserves underlying the leasehold had been depleted in 1966. Since ample reserves have subsequently been discovered under the leasehold, a geological examination prompted by an abandonment application might well have indicated the existence of those reserves during the period the leasehold was not producing. Because no application was filed, the Commission, United, and other interested parties had no occasion to conduct such an examination. However, when United was informed in 1966 that the well on the property had ceased producing, it did not acknowledge that the reserves under the leasehold had been depleted; instead it informed the producer that it would reinstate its equipment "if, at some future date, you have further gas to deliver to us at the above delivery point, which will be subject to the terms of the [1953 gas sales contract, as extended]." (A. 8A-9A.) At all events, what the evidence might have shown if an application has been filed is immaterial; Section 7(b) does not require



Commission should be reversed for having disregarded, in this proceeding, "the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed" (Br. 17; see also *id.* at 22), respondents overlook the evidentiary fact that dominates the present record: the fact that the reserves under the leasehold were not depleted in 1966, because they are not depleted now.

Respondents' theory would also undermine Section 7(b)'s objective of providing certainty in the regulatory scheme. Interested persons such as prospective assignees of dedicated acreage, or purchasers of gas from such acreage, would never know whether, at some future time, the Commission might determine that the service of supplying gas from the acreage should be deemed to have been previously abandoned.

Respondents' claim that Haring's failure to file for abandonment in 1966 ("when the paper should have been filed" (Br. 17)) was in "good faith," and based on advice of counsel that an application was unnecessary, is wholly irrelevant. Even if it were assumed that Haring operated under a sincere mistake of law, a person cannot escape his failure to comply with statutory requirements by claiming ignorance of the law, and he is certainly not entitled to benefit from his ignorance or non-compliance at the expense of those whom the statute was designed to protect.[3]

For all these reasons, the Commission was well within its authority under Section 7(b) in refusing to grant respondents' request that abandonment be authorized retroactively to some date between 1966 and 1971.

the Commission to speculate about what evidence would have been developed or what it would have done if respondents or their predecessors had complied with the statutory procedures.

[3]Respondents' claim that Haring acted in "good faith" is unfounded in any event. Haring's "good faith" consisted, as

c. Respondents rely (Br. 13-18) on several cases in support of their claim that the Commission should have granted retroactive abandonment here. Those cases, which (with one exception) did not involve abandonment under Section 7(b),[4] do not support respondents in any event. To the contrary, they reflect the same general principle that underlies the Commission's decision here: that administrative remedies should be designed to promote compliance with statutory requirements and not to reward noncompliance.

*Plaquemines Oil and Gas Co.* v. *FPC*, 450 F. 2d 1334 (D.C. Cir. 1971), and *Niagara Mohawk Power Corp.* v. *FPC*, 379 F. 2d 152 (D.C. Cir. 1967), were cases in which parties had failed to seek Commission authorization for their acts at a time when such authorization was required by the relevant statutes and decisions. To prevent those parties from benefitting from their failure to comply with the law, the Commission fashioned remedies on the basis of the assumption that the statutory requirements had been complied with at the proper time, and the courts approved the Commission's remedies as imposing "a condition that puts the wrongdoer in no worse stance

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respondents concede (Br. 5, 18), of his considered and deliberate refusal to file an abandonment application in the face of letters from the Secretary of the Commission stating that "it will be necessary" to do so if no further sales of gas were contemplated (see our main brief at 6-7).

[4]The exception, cited by respondents at Br. 21, *Arkansas Louisiana Gas Company*, FPC Docket No. CP76-329 (March 8, 1977), involved no retroactivity question and provides no support for respondents. In that case a certificated pipeline had contracted to sell "excess gas" (gas supplied to it in excess of its other needs), but in 1971 its supplier ceased providing any such excess gas. In essence, its supply had become depleted in 1971 and remained depleted in 1977, when the seller sought and obtained abandonment permission from the Commission. The seller in that case, unlike respondents and their predecessors, recognized the necessity of obtaining abandonment permission even though its supply of gas was physically depleted.



than the company that has punctiliously observed the requirements of law * * *." *Niagara Mohawk Power Corp.* v. *FPC, supra,* 379 F. 2d at 159.[5]

*Borough of Ellwood City* v. *FERC,* 583 F. 2d 642 (3d Cir. 1978), petition for cert. filed, No. 78-945, and *Highland Resources, Inc.* v. *FPC*, 537 F. 2d 1336 (5th Cir. 1976), were cases in which a party failed to tender filings in reasonable reliance either on Commission regulations or on the law that existed at that time (which was subsequently changed to impose a filing requirement not previously thought to exist). In those cases the courts upheld the Commission's discretion to forgive the earlier failures to file, so long as filings were promptly made after the change in law. In this case, respondents make no claim that the failure to seek abandonment permission in 1966-1971 was based on Commission regulations or pronouncements or was permitted by the law existing at that time.

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[5]See also *Plaquemines Oil and Gas Co.* v. *FPC, supra,* in which the court stated (450 F. 2d at 1337-1338):

> [T]he Commission, in acting upon applications for certification filed some time after Commission jurisdiction was asserted * * * has the equitable power "to regard as being done that which should have been done" by recreating the past, insofar as is reasonably possible, to reflect compliance with the Act and to order refunds to be paid if necessary to achieve that goal.

That case involved a producer who failed to file for certificates authorizing gas sales from 1961 (when the Commission first asserted jurisdiction over the sales) to 1966, and the Commission concluded that it would be appropriate to order the producer to refund whatever charges were in excess of those that the Commission would have authorized as just and reasonable if certificates had been sought and obtained. The court approved the Commission's general principle, but reversed with respect to certain refunds on the ground that the Commission had failed to apply its principle to those refunds. 450 F. 2d at 1337-1341. The court's decision does not support respondents' claim (Br. 15) that the Commission must treat them as having properly sought and obtained abandonment in 1966-1971 and thus permit them to evade the obligations and requirements of the Act.

The Commission's decisions in those cases and in this case are based on the same principle: remedies should be fashioned to promote and ensure compliance with statutory procedures and to prevent rewarding non-compliance. In some cases that principle requires the Commission to regard as having been done that which should have been done. In other cases, where there has been a change in law imposing new requirements, it may be inappropriate to impose those requirements retroactively, since to do so would not have the effect of promoting compliance. In cases where, as here, there has been no change in law, and retroactive relief would benefit a party for having failed to comply with statutory requirements, the Commission properly declined to grant such relief.[6]

## II

Respondents also contend (Br. 22-31) that the reserves of gas from which they are currently producing were never dedicated to interstate commerce because they are different from the reserves from which their predecessors produced until 1966. That contention is contrary to the record and to this Court's decisions concerning the scope of dedications under the Natural Gas Act.

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[6]Respondents' contention comes down to the proposition that an agency should regard a person as having complied with a statutory authorization requirement at some earlier time if the agency probably would have granted the authorization if it had been sought at that time. We know of no cases supporting that proposition. If sustained, it would have a dramatic impact in virtually every field of administrative law. It suggests that in any case where a person must obtain a license or other regulatory authority for certain action (*e.g.*, a license to drive a car, or an extension of an alien's visa), a person could defend an action charging him with failure to obtain such authority on the ground that if he had applied for it the agency probably would have granted him the authorization. Few regulatory systems could operate under such a principle.



As stated in our main brief (at 4-5), in 1953 Mrs. Bee Quin, as lessee of the Butler B tract, executed a gas sales contract with United in which she agreed to sell "merchantable natural gas * * * produced from all wells now or hereafter drilled during the term of this contract on the land and leaseholds" covered by the contract. The term of that contract was later extended to 1981. In 1954, Mrs. Quin applied for and received certificates from the Commission authorizing sales of gas covered by the contract in interstate commerce to United. The certificate contained no time limitation (Pet. App. A-32 to A-33), and the certificate, contract, and lease contained no provision limiting the depth of origin of the gas to be delivered from the Butler B tract (Pet. App. A-32 to A-33; A. 13A-14A).[7]

Under principles firmly established by this Court and the courts of appeals, the certificate issued by the Commission thus imposed an obligation on respondents to continue the service of supplying all gas produced from the leasehold to interstate commerce, as undertaken in the original contract and certificate application. As this Court explained in *Sunray, supra,* 364 U.S. at 156, the scope of the service that is dedicated to interstate commerce is determined by the certificate application and the certificate itself:

> An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which "gas may be initially dedicated to

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[7]When the original contract was amended to extend its term to 1981, a later assignee of the lease, Pagenkopf, obtained a new certificate that authorized the same service as the original certificate (A. 6A-8A; FERC Br. 5). Those changes did not diminish the scope of the initial service obligation.

> interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval * * *" [quoting *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 389 (1959)].

In this case respondents' predecessors sought and obtained a certificate of unlimited duration authorizing sales of all gas produced from the Butler B lease, and initiated service under that certificate. In those circumstances, as this Court recently reaffirmed in *California* v. *Southland Royalty Co.*, 436 U.S. 519, 525 (1978):

> [O]nce gas began to flow in interstate commerce from a field subject to a certificate * * *, that flow could not be terminated unless the Commission authorized an abandonment of service. The initiation of interstate service pursuant to the certificate dedicated all fields subject to that certificate.

See also *Murphy Oil Corp.* v. *FERC*, No. 77-1720 (8th Cir. December 28, 1978); *Harrison* v. *FERC*, 567 F. 2d 308 (5th Cir. 1978); *Phillips Petroleum Co.* v. *FPC*, 556 F. 2d 466 (10th Cir. 1977); *Mitchell Energy Corp.* v. *FPC*, 533 F. 2d 258 (5th Cir. 1976). In short, respondents' claim that the certificate dedicated only the first reservoir from which gas was produced under the leasehold finds no support in the record or in decisions under the Natural Gas Act.[8]

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[8]In support of this claim, respondents appear to argue that the purpose of the Natural Gas Act is to protect the reliance of the consuming public that is created by initial deliveries in interstate commerce, and that the public relies only on the reservoirs from which that initially delivered gas is produced (Resp. Br. 24-26). There is no basis for the claim that the public's reliance is so limited. If the public relies on anything, it relies on the service proposed in the certificate application and contract and authorized by the certificate, all of which refer to gas produced from specified acreage, not from specified wells or reservoirs.

Moreover, respondents' theory would be difficult, at best, to administer. Respondents claim that "[n]o reliance has been placed on McCombs' reserves" (Br. 24) because of the difference in depth between the initial producing well and the later-discovered ones (see *id.* at 24, 26, 29). Respondents do not suggest how great the difference in depth must be—just as they do not suggest how long the time period between production must be—in order to free the new well from the dedication of the earlier one. Any attempt by the Commission—much less the courts, as respondents here propose—to draw such lines would invite administrative chaos. It would also ignore the mechanism that Congress has provided, in the abandonment provision of Section 7(b), for delineating the scope of dedications under the Act.



## CONCLUSION

For the foregoing reasons and the reasons given in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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